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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JOHN NAPOLITANO,

Defendant and Appellant.

2d Crim. No. B203039
(Super. Ct. No. 2006012895)
(Ventura County)

David John Napolitano pled guilty to two counts of forgery (Pen. Code, §§ 475, subd. (b) & 484e, subd. (d));¹ one count of grand theft (§ 484e, subd. (b)); and one count of possession of stolen property (§ 496). The plea was pursuant to a plea bargain in which other counts were dismissed. Napolitano challenges the restitution order. We affirm.

FACTS

Michael Cox, Christopher Daily and Brad Haber own Totally Polished, an automobile customizing business. On July 10, 2005, they reported to the police that several thousand dollars worth of tools and inventory had been stolen.

¹ All statutory references are to the Penal Code.

In October 2005, Cox and Daily learned that a man working on an engine at a residence was using a tool cart with a Totally Polished logo on it. Daily met the police at the residence. From outside the residence, Daily identified an engine and some tools that had been stolen from his business. Napolitano came out of the residence. But when an officer said he wanted to talk to him, he went back inside.

The police executed a search warrant on Napolitano's residence. Officers found numerous items reported stolen from Totally Polished. In addition, officers found credit reports, forged checks and stolen mail in various people's names. Finally, officers found methamphetamine, several methamphetamine pipes and a window punch, a device used by auto burglars.

Napolitano was charged with 14 counts of receiving stolen property and one count of grand theft. Pursuant to a plea agreement, he pled guilty to one count of receiving stolen property and one count of grand theft, and two forgery counts. The plea agreement included two other cases in which Napolitano had been charged. None of the counts to which Napolitano pled were related to the theft from Totally Polished.

Napolitano's plea agreement included a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) that allows the trial court to consider the dismissed counts in determining his sentence. Napolitano specifically acknowledged that the court could consider the dismissed counts in determining the amount of restitution.

Restitution Hearing

Cox, Daily and Haber testified at the restitution hearing. They estimated that 90 percent of their tools and inventory were stolen in the burglary, and as a result they had to close their business. They estimated the value of their tools to be between \$60,000 and \$80,000. The economic value of the loss of business was \$300,000 or \$100,000 each.

The trial court found the value of the stolen tools and inventory to be \$60,000, and the value of all the items recovered from Napolitano's home to be \$10,000, or one-sixth of the total. Because the total loss of business was \$300,000 the trial court ordered restitution of \$50,000, or one-sixth of the total loss.

DISCUSSION

I

Napolitano contends the restitution order is improper because it was based on counts to which he did not plead guilty. He points out that none of the charges to which he pled guilty relate to the restitution order in favor of the owners of Totally Polished.

California Constitution, article 1, section 28, subdivision (b), gives victims of criminal activity "the right to restitution from the persons convicted of the crimes for losses they suffer." Similarly, section 1202.4, subdivision (a)(1), provides in part: "[A] victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime."

Napolitano argues that both the California Constitution and section 1202.4, subdivision (a)(1), limits restitution to losses resulting from crimes of which the defendant was convicted.

But as part of his plea agreement, Napolitano executed a *Harvey* waiver. He expressly agreed that "[t]he Court can use [the facts in the dismissed counts] to determine what an appropriate sentence is, including the amount of restitution." Having accepted the benefit of the bargain, Napolitano now wishes to improve his position by avoiding the restitution to which he agreed. "[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Napolitano argues that, even with a *Harvey* waiver, the trial court cannot order restitution on the dismissed counts. He claims that under section

1192.3 the trial court can only order restitution on the dismissed counts where those counts arose from "the same or related course of conduct" as the counts to which the defendant pled guilty. (*Ibid.*)

Section 1192.3 provides in part: "A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, . . . which public offense did not result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses *arising from the same or related course of conduct* by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea . . . , *so long as* the plea is freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court. [¶] If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 from the defendant as to the dismissed count." (Italics added.)

The statute is permissive. It authorizes the trial court to impose restitution under the stated circumstances. It does not prohibit the court from ordering restitution under other circumstances. Specifically, it does not prohibit restitution for dismissed counts where the dismissed counts arise from a different course of conduct than the counts to which the defendant pled guilty. Had the Legislature intended to limit restitution to counts arising from "the same or related course of conduct" (§ 1192.3), it would have placed that language after "so long as." (*Ibid.*) The constitutional policy of this state is to provide for restitution. (Cal.Const., art. 1, § 28, subd. (a).) In light of such a policy, we decline to read the permissive language of section 1192.3 as a limitation on the court's power.

In any event, Napolitano assumes that because the counts to which he pled guilty did not arise from the Totally Polished burglary, they did not arise from the same or related course of conduct. Napolitano's argument ignores that he pled guilty to receiving stolen property, the same offense as the charges relating to the

Totally Polished burglary. The trial court could reasonably conclude Napolitano engaged in a course of conduct of receiving stolen property from a number of different thefts. Napolitano cites no authority that this does not constitute "the same or related course of conduct" within the meaning of section 1192.3.

Napolitano's reliance on *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246-1249, is misplaced. There the defendant was convicted after a jury trial. The case involved neither a plea bargain nor a *Harvey* waiver.

II

Napolitano contends that the amount of restitution is not supported by the evidence.

In reviewing the sufficiency of the evidence we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Johnson, supra*, at p. 578.)

Napolitano argues that the amount of restitution should not be based on \$300,000. He claims he should not be responsible for tools that were stolen by and are in the possession of some other person. He believes the proper amount to determine restitution should be \$240,000.

The trial court agreed that Napolitano should not be ordered to make restitution for the tools. It is true that some of the testimony of Totally Polished's owners indicates that the value of the lost tools is included in their estimates of loss. But other testimony was that they each made about \$100,000 per year and had to close their business because their tools were stolen. Thus the trial court could reasonably conclude the owners of the business lost \$300,000 in income alone.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Kevin McGee, Judge
Superior Court County of Ventura

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